

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LAURENCE LOSCALZO	:	DETERMINATION
	:	DTA NO. 806863
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner, Laurence LoScalzo, c/o Kenneth E. Boklan, Esq., 1400 Wantagh Avenue, Wantagh, New York 11793, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on June 27, 1991 at 9:15 A.M. Petitioner filed a brief on July 29, 1991. The Division of Taxation filed a brief on September 20, 1991. Petitioner filed a reply brief on October 2, 1991. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly determined that, pursuant to 20 NYCRR 590.50(a)(3), petitioner should have a carryover original purchase price with respect to certain real property acquired in a "mere change of identity" transfer under Tax Law § 1443.5, or whether said regulation is beyond the scope of Article 31-B and is invalid.

FINDINGS OF FACT

At all times relevant herein, petitioner, Laurence LoScalzo, was the sole shareholder of Kim-Brooke Enterprises, Inc. ("Kim-Brooke").

Petitioner paid \$2,247,010.00 to acquire his interest in Kim-Brooke.

Kim-Brooke's principal asset was a parcel of real property known as "Vacant Land",

Sound Avenue, Riverhead, New York, the subject property herein.

Kim-Brooke was dissolved pursuant to a corporate resolution adopted on June 30, 1988. This dissolution plan provided for the complete liquidation and distribution of all assets of the corporation in November 1988.

Petitioner subsequently acquired his interest in the subject property in a liquidating distribution of the assets of Kim-Brooke in exchange for his stock in Kim-Brooke.

At the time of such liquidating distribution, the fair market value of the subject property was \$6,000,000.00.

Petitioner subsequently sold the subject property to DiCanio Residential Communities, Inc. for \$6,000,000.00. The date of this transfer was January 12, 1989.

Petitioner paid \$375,299.00 in real property transfer gains tax at the time of the January 12, 1989 transfer. Said tax was determined by the Division as follows:

Consideration in respect of 1/12/89 transfer	\$6,000,000.00
Purchase price to acquire property, i.e., to acquire Kim-Brooke stock	<u>2,247,010.00</u>
Gain subject to tax at 10%	\$3,752,990.00

Petitioner later filed a claim for refund of gains tax paid. The Division denied petitioner's refund claim by letter dated April 5, 1989.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a 10% tax on gains derived from real property transfers in New York. "Gain" is defined as "the difference between the consideration for the transfer of real property and the original purchase price of such property" (Tax Law § 1440.3). Tax Law § 1440.5(a) defines original purchase price ("OPP") as, generally, "the consideration paid or required to be paid by the transferor; (i) to acquire the interest in real property...."

B. Tax Law § 1443.5 provides for a total or partial exemption from gains tax under the following circumstances:

"If a transfer of real property, however effected, consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest."

C. Regulations at 20 NYCRR 590.50 interpreting the "mere change of identity" provision

of Tax Law § 1443.5 provide, in pertinent part, as follows:

"(a) Question: Section 1143(5) of the Tax Law exempts a transfer from the gains tax to the extent it 'consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest.' Does this exempt:

* * *

(3) The transfer of real property by a corporation to its shareholders, who will hold the real property as tenants-in-common in the same pro rata share as they own the corporation?

Answer: Yes. This is a mere change of identity or form of ownership or organization. The shareholders will have a carry-over original purchase price in the real property."

D. The dispute herein centers upon a determination of the original purchase price of the subject property. The Division determined that since the transfer by which petitioner acquired the subject property (i.e., the corporate liquidation) was exempt from gains tax as a mere change of identity or form of ownership pursuant to Tax Law § 1443.5, then pursuant to 20 NYCRR 590.50(a)(3), petitioner's OPP is properly carried over from the amount petitioner paid to acquire his interest in Kim-Brooke.

In response, petitioner does not dispute that the transfer from Kim-Brooke to petitioner was exempt from gains tax as a mere change of identity or form of ownership under Tax Law § 1443.5. Nor does petitioner dispute that, under the instant circumstances, 20 NYCRR 590.50(a)(3) calls for a carryover original purchase price to petitioner. Petitioner does, however, challenge the validity of this regulation. Specifically, petitioner cites Tax Law § 1440.5(a), which defines OPP for gains tax purposes as, generally, the consideration paid by the transferor to acquire the property. Petitioner further notes that the only statutory exception¹ to this general definition is contained in Tax Law § 1440.5(b) which provides for a carryover OPP for transfers by gift, devise, bequest or inheritance. Petitioner further notes that section 1440.5 does not provide for a carryover OPP in the case of a "mere change of identity or form of ownership". Since the Legislature did not specifically provide a definition of OPP in the case

¹Tax Law § 1440.5(c) also provides for a carryover original purchase price where no consideration is paid for a transfer.

of a "mere change", petitioner argues, the Division's regulation at 20 NYCRR 590.50(a)(3) is inconsistent with the statute and is invalid. Petitioner contends that a plain reading of Tax Law § 1440.5(a) requires that petitioner's OPP herein be the consideration paid by petitioner to Kim-Brooke upon that corporation's liquidation.

E. In order to prove that a regulation is invalid, petitioner bears a heavy burden:

"To prevail over the administrative construction, petitioner must establish not only that its interpretation of the law is a plausible one but, also, that its interpretation is the only reasonable construction (see, Matter of Lakeland Farms v. State Tax Comm., 40 AD2d 15, 18, 336 NYS2d 972). Thus, unless the Department of Taxation and Finance's regulation is shown to be irrational and inconsistent with the statute (Matter of Slattery Assoc. v. Tully, 79 AD2d 761, 434 NYS2d 788) or erroneous (Matter of Kroner v. Procaccino, 39 NY2d 258, 383 NYS2d 295), it should be upheld." (Blue Spruce Farms, Inc. v. State Tax Commn., 99 AD2d 867, 472 NYS2d 744, 745, affd 64 NY2d 682, 485 NYS2d 526.)

F. Here, petitioner has failed to show both that the Division's regulation is irrational and that his interpretation is the only reasonable one.

The regulation in question provides for a carryover OPP where there has been a transfer for consideration which was exempt from gains tax as a "mere change". In other words, in tax-exempt transfers involving no change of beneficial ownership there is no change in OPP. This is clearly a rational and practical method for determining OPP in the case of a "mere change". In contrast, petitioner's interpretation of the statute, which would invalidate the regulation, would allow for a step-up in OPP with respect to "mere change" transfers, while still maintaining the tax-exempt status of such transfers. This interpretation would invite and enable gains tax avoidance on such a scale as would effectively eviscerate Article 31-B. That such an interpretation is unreasonable seems self-evident.

G. The petition of Laurence LoScalzo is denied and the Division's denial of petitioner's refund claim, dated April 5, 1989, is sustained.

DATED: Troy, New York
May 28, 1992

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE